

CONSUMER FINANCIAL PROTECTION BUREAU
Washington, DC 20552

In the Matter of)
)
CAG Acceptance, LLC,)
)
and)
)
Gordon Howard Associates, Inc.,)
d/b/a PassTime USA)
)
_____)

Complaint, Request for Investigation, Injunction, and Other Relief

Submitted by

The Electronic Privacy Information Center (“EPIC”)

I. Introduction

1. This Complaint concerns the unfair, deceptive, and abusive acts and practices of CAG Acceptance LLC, Chapman Auto Group, and Gordon Howard Associates, Inc., d/b/a PassTime USA, involving the use of starter interrupt devices (“SIDs”) to monitor and control the location of subprime auto loan borrowers.

II. Parties

2. The Electronic Privacy Information Center (“EPIC”) is a public interest research center located in Washington, D.C. EPIC focuses on emerging privacy and civil liberties issues and is a leading advocate for consumer privacy. EPIC has worked extensively on the privacy and data security implications of connected cars and has long advocated for locational privacy protections.¹

¹ See, e.g., Letter from EPIC et al. to FCC Chairman Tom Wheeler (Aug. 24, 2016), <https://epic.org/2016/08/epic-consumer-coalition-tells-.html> (advocating for safety rules for connected cars); *The Internet of Cars: Hearing Before the Subcomm. on Information Tech. and Subcomm. on Trans. And Pub. Assets of the H. Comm. on Oversight and Govt. Reform*, 114th Cong. 15-16 (statement of Khaliah Barnes, Associate Director, EPIC), <https://epic.org/privacy/edrs/EPIC-NHTSA-V2V-Cmts.pdf>; Comments of EPIC, *Wireless E911 Location Accuracy Requirements; E911 Requirements for IP-Enabled Service Providers*, Docket Nos. PS 07-114, WC 05-196 (Aug. 10, 2007), https://epic.org/privacy/pdf/EPIC_e911_Comments.pdf; Reply Comments of EPIC, *In re CTIA Petition for Rulemaking to Establish Fair Location Practices*, WT Docket No. 01-72 (Apr. 24, 2001), https://epic.org/privacy/wireless/epic_reply.pdf.

3. Chapman Auto Group, LLC is a limited liability company formed in Arizona in 1996.²
4. CAG Acceptance, LLC (CAGA) is a limited liability company formed in Arizona in 1997.³ CAGA is licensed as a sales finance company by the Arizona Department of Financial Institutions under license number 0916851. CAGA offers vehicle title loans in Arizona and Nevada.⁴ CAGA finances loans for Chapman Auto Group's "25+ dealerships" within Arizona and Nevada.⁵ In total, 27 dealerships are advertised on its website.⁶
5. Gordon Howard Associates, Inc., d/b/a PassTime USA ("PassTime"), is a corporation formed in 1993 under the laws of Colorado, assigned Colorado Secretary of State ID number 19931033565.
6. PassTime provides GPS tracking and remote automobile access and disabling services to auto financing companies, including CAGA. PassTime's customer base includes "10,000 auto dealers, auto finance companies, auto leasing companies and insurance companies worldwide."⁷

III. Jurisdiction

7. The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has jurisdiction over this complaint pursuant to sections 1053 and 1055 of the Consumer Financial Protection Act of 2010 ("CFPA").⁸
8. Under section 1053 of the CFPA, the CFPB may bring an adjudication proceeding to enforce compliance with section 1031 of the CFPA, prohibiting "unfair, deceptive, or abusive acts or practices."⁹
9. Under section 1055 of the CFPA, the CFPB has jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of federal consumer financial law, including section 1031.¹⁰
10. CAGA is a "covered person" under the CFPA because it is a limited liability company that engages in offering and providing vehicle title loans, which are "consumer financial products or services" under the CFPA.¹¹

² Arizona Corporation Commission, File No. L07927630.

³ Arizona Corporation Commission, File No. L08118536.

⁴ CAG Acceptance LLC, <http://www.cagloan.com/> (last visited Mar. 15, 2017).

⁵ *About Chapman Choice*, Chapman Automotive Group, <https://www.chapmanchoice.com/about.asp> (last visited Mar. 15, 2017).

⁶ Chapman Automotive Group, <https://www.chapmanchoice.com/> (last visited Mar. 15, 2017).

⁷ *About Us*, PassTime GPS Tracking Solutions, <https://passtimegps.com/about/>.

⁸ 12 U.S.C. §§ 5563, 5565.

⁹ 12 U.S.C. § 5563(a); 12 U.S.C. § 5531.

¹⁰ 12 U.S.C. §§ 5563, 5565; 12 U.S.C. § 5531.

11. CAGA operates a business that “involves the extension of retail credit or retail leases involving motor vehicles” in which “the extension of retail credit or retail leases are provided directly to consumers”; those extensions of credit or leases are “not routinely assigned to an unaffiliated third party finance or leasing source.”¹²
12. PassTime provides material services to CAGA and similar subprime auto lenders in connection with their offering or provision of consumer financial products or services. PassTime is therefore a “service provider” under the CFPB.¹³
13. The CFPB has previously taken actions against auto lenders. In 2016, it issued a consent order against Toyota Motor Credit Corporation for “permitting dealers to charge higher interest rates to consumer auto loan borrowers on the basis of race and national origin.”¹⁴ In 2015, the CFPB issued a consent order against Fifth Third Bank “for discriminatory auto loan pricing and for illegal credit card practices.”¹⁵ And in 2014, the CFPB issued a consent order against DriveTime Automotive Group and DT Acceptance Corp, a “buy here, pay here” auto dealer.¹⁶

IV. Factual Background

A. The Rapidly Growing Auto Loan Industry Targets Subprime Borrowers

14. The auto loan industry has seen significant increases in the past few years, with outstanding loans totaling over one trillion dollars for two consecutive quarters in 2016.¹⁷
15. According to a recent study, almost half of all auto loans in 2016 were to borrowers with a sub-680 FICO score.¹⁸
16. Credit reporting agency Experian defines borrowers with FICO scores below 670 to be subprime borrowers.¹⁹
17. Consumers in the subprime auto lending industry are charged interest rates as high as 30%.²⁰

¹¹ 12 U.S.C. §§ 5481(5), (6), (15)(A)(i), (19).

¹² 12 U.S.C. § 5519(b)(2).

¹³ 12 U.S.C. § 5481(26).

¹⁴ Consent Order, *In re Toyota Motor Credit Corp.*, CFPB No. 2016-CFPB-0002 (Feb. 2, 2016).

¹⁵ Consent Order, *In re Fifth Third Bank*, CFPB No. 2015-CFPB-0024 (Sept. 8, 2015).

¹⁶ Consent Order, *In re DriveTime Auto. Grp.*, CFPB No. 2014-CFPB-0017 (Nov. 19, 2014).

¹⁷ Greg Gardner, *Car Loans Now Top \$1 Trillion as Delinquency Rates Rise*, USA Today (Sept. 7, 2016), <http://www.usatoday.com/story/money/cars/2016/09/06/car-loans-now-top-1-trillion-delinquency-rates-rise/89911210/>.

¹⁸ See Matt Turner, *We Just Got Some Data on Auto Lending, and It's Setting Off Alarm Bells*, Business Insider (Sept. 13, 2016, 11:45 AM), <http://www.businessinsider.com/jpmorgan-gordon-smith-on-auto-lending-2016-9/#close-to-half-of-all-auto-loans-are-to-borrowers-with-a-sub-680-fico-score-1>.

¹⁹ Blaine Lyerla, *What are the Different Credit Scoring Ranges?*, Experian (April 23, 2015), <http://www.experian.com/blogs/ask-experian/infographic-what-are-the-different-scoring-ranges/>.

18. More than one in four subprime borrowers default on their auto loans.²¹

B. Subprime Auto Lenders Frequently Install GPS-Enabled Starter Interrupt Devices to Engage in Constant, Real-Time Surveillance and Geo-Fencing of Debtors

19. Subprime auto-lenders increasingly require installation of “Starter Interrupt Devices” (“SIDs”) as a condition of vehicle financing.²²

20. Lenders use SIDs to remotely disable the ignition of vehicles when borrowers are late on payments or travel outside of certain geographical boundaries.²³

21. Many SIDs are also equipped with a Global Positioning System (“GPS”). Lenders monitor the location of vehicles in real-time, records and store trip logs, and develop secret profiles of borrowers on these travel records.

22. Manufacturers such as PassTime and Lender Systems explicitly market the real-time location tracking abilities of their devices.²⁴

23. In addition to real-time location tracking, many SIDs also have geo-fencing capabilities that notify lenders when the vehicle travels beyond a predetermined geographic boundary.²⁵

24. One industry expert estimated that nearly seventy percent of vehicles financed by subprime loans are currently equipped with “payment assurance devices” that feature a combination of GPS tracking, starter interrupt, and payment reminder capabilities.²⁶

25. The CFPB has reported receiving several complaints about SIDs.²⁷

²⁰ John M. Vincent, *Subprime Auto Loans: Why You Should Avoid Them*, U.S. News (Aug. 23, 2016), http://usnews.rankingsandreviews.com/cars-trucks/best-cars-blog/2016/08/Subprime_Auto_Loans_Why_You_Should_Avoid_Them/.

²¹ *Id.*

²² See CFPB, *CFPB Examination Procedures at Auto Finance* 48 (2015), http://files.consumerfinance.gov/f/201506_cfpb_automobile-finance-examination-procedures.pdf; Kwesi D. Atta-Krah, *Preventing A Boom From Turning Bust: Regulators Should Turn Their Attention to Starter Interrupt Devices Before the Subprime Auto Lending Bubble Busts*, 101 Iowa L. Rev. 1187, 1189 (2016).

²³ Michael Corkery & Jessica Silver-Greenberg, *Miss a Payment? Good Luck Moving That Car*, N.Y. Times (Sept. 24, 2014), <http://dealbook.nytimes.com/2014/09/24/miss-a-payment-good-luck-moving-that-car/>.

²⁴ See *GPS Tracking for Auto Finance Companies & BHPH Dealers*, PassTime GPS Tracking Solutions, <https://passtimegps.com/gpx-2/> (last visited Mar. 15, 2017); *iPay Anti-tampering GPS*, Lender Systems, http://www.lendersystems.com/images/iPAY%20GPS%20Anti-tamper_10-2013.pdf (last visited Mar. 15, 2017).

²⁵ Corkery & Silver-Greenberg, *supra* note 23.

²⁶ Jaeah Lee, *Wait, Banks Can Shut Off My Car?*, Mother Jones (March/April 2016), <http://www.motherjones.com/politics/2016/04/subprime-car-loans-starter-interrupt> (quoting Corinne Kirkendall, PassTime USA Vice President for Public Relations).

C. PassTime USA is the Leading Service Provider of SIDs for the Subprime Auto Lending Industry

26. PassTime is a leading manufacturer and supplier of SIDs for the subprime auto lending industry, with a customer base of “10,000 auto dealers, auto finance companies, auto leasing companies and insurance companies worldwide.”²⁸
27. According to PassTime’s website, the company has more than two million devices deployed worldwide.²⁹
28. PassTime provides the “PassTime Elite” device, which is equipped with starter interrupt, GPS tracking, and geofencing capabilities. According to PassTime, the device “will locate asset if needed and provide a location history in the event vehicle recovery is deemed necessary. Elite’s advanced ‘geo-fencing’ technology assists in vehicle monitoring and gives a lender the ability to determine if their financed vehicle leaves a certain area.”³⁰
29. “PassTime TRAX” is the company’s “low cost Auto Dealer GPS tracking device for BHPH and auto finance companies.” The PassTime TRAX device is equipped with real-time auto dealer GPS tracking, up to six geo-fences, and customizable speed alerts. The device transmits its location automatically every 72 hours, and dealers have the option to monitor location “24/7/365.”³¹
30. PassTime offers a variety of additional services to support PassTime devices, including:

24-Hour Tracking: Create a location history by setting 24-Hour Tracking to automatically log the location of a vehicle every three hours.

...

Ignition Notification: Create a trip report using Ignition Notification features. Activate ignition notification to automatically be alerted each time the vehicle is turned on, turned off, or both. The time, date and current location of each instance is also recorded and sent to you.³²

²⁷ Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47,864, 47,883 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

²⁸ *About Us*, PassTime GPS Tracking Solutions, <https://passtimegps.com/about/> (last visited Mar. 15, 2017).

²⁹ PassTime GPS Tracking Solutions, <https://passtimegps.com/> (last visited Mar. 15, 2017).

³⁰ *PassTime Elite for Auto Finance, Auto Dealers, Insurance Companies & International*, PassTime GPS Tracking Solutions, <https://passtimegps.com/elite-2/> (last visited Mar. 15, 2017).

³¹ *PassTime TRAX for BHPH Dealers & Auto Finance Companies*, PassTime GPS Tracking Solutions, <https://passtimegps.com/trax-home/> (last visited Mar. 15, 2017).

³² *PassTime Services*, PassTime GPS Tracking Solutions, <https://passtimegps.com/services/> (last visited Mar. 15, 2017).

31. PassTime devices rely on wireless connections to track vehicle location and to disable and enable vehicles.³³
32. PassTime offers customizable mobile applications that allow dealers to “[t]rack your vehicles from your smartphone.”³⁴
33. PassTime provides dealers with disclosure forms for consumers to read and sign prior to purchasing a vehicle equipped with PassTime SIDs.³⁵
34. The PassTime disclosure form requires borrowers to agree to the following statement:

I agree that I have no right to privacy regarding the use of the GPS device to track the location of the vehicle, but in the event that a court, arbitrator, dispute resolution organization or state or federal authority should determine that such a right exists, I hereby waive such right to the fullest extent possible.³⁶

D. Subprime Auto Lender CAGA Employs PassTime Services to Engage in Real-Time Monitoring of Debtors and to Restrict Debtors’ Freedom of Movement

35. CAGA is a subprime auto lender, whose average customer has a credit score of 500.³⁷ In 2013, 95 percent of new CAGA borrowers had PassTime SIDs installed in their vehicles.³⁸
36. CAGA has required installation of a PassTime SID on a vehicle when the borrower had a credit score of 690, high above the standard of subprime.³⁹
37. CAGA has settled at least one lawsuit based on the use of a PassTime SID to disable a borrower’s vehicle while she was driving on the freeway.⁴⁰

³³ PassTime GPS Tracking Solutions, <https://passtimegps.com/> (last visited Mar. 15, 2017).

³⁴ *PassTime Apps*, PassTime GPS Tracking Solutions, <https://passtimegps.com/apps/> (last visited Mar. 15, 2017).

³⁵ *Meeting of the Assemb. Comm. on Commerce and Labor* (Nev. Mar. 22, 2013) [hereinafter *Nev. Commerce Comm.*] (Testimony of Corinne Kirkendall, Vice President of Public Relations, PassTime USA), <http://www.leg.state.nv.us/Session/77th2013/Minutes/Assembly/CL/Final/493.pdf> (“PassTime provides consumer disclosures for every state to the dealers and lenders.”).

³⁶ *PassTime GPS Payment Assurance System Disclosure Statement and Agreement for Installation*, PassTime GPS Tracking Solutions, http://carvant.com/uploads/Deal%20Docs/2010_06.FL_GA_MD_MI_NC_NJ_PA_PassTime.pdf (last updated Feb. 28, 2008) [attached herein as Exhibit A].

³⁷ *Nev. Commerce Comm.*, *supra* note 35 (testimony of Christine Hennick, Director of Finance, CAGA Acceptance).

³⁸ *Id.*

³⁹ *Id.* (Testimony of T. Candice Smith, Private Citizen).

⁴⁰ Corkery & Silver-Greenberg, *supra* note 23.

38. CAGA requires borrowers to have GPS-enabled SIDs installed on their vehicles as a condition of vehicle financing. The CAGA installment sales contract states, “Installation of the [PassTime] Device is required as a condition of approving our extension of credit to you and is installed for our protection only.”⁴¹
39. The CAGA contract requires borrowers to agree to allow CAGA to “(i) use the [PassTime] Device to gather information about the location of the Vehicle, (ii) use that information to assist in the repossession of the Vehicle or other exercise of our remedies under the Contract, and (iii) give that information to other persons who may or may not be affiliated with us in connection with the repossession of the Vehicle or other Exercise of our remedies under the Contract.”⁴²
40. The CAGA contract does not identify any restrictions on the frequency or duration of location monitoring. The contract also does not identify how long borrowers’ location data is retained, or whether and how CAGA disposes of that data.
41. The CAGA contract states, “The Device and all information that we obtain from the device remain our sole property.”⁴³

E. The Use of GPS-Enabled SIDs to Monitor and Control Borrowers’ Location Poses Serious Privacy and Safety Risks

42. GPS tracking systems collect and retain vast amounts of data, including precise location (determined by latitude and longitude to within 3.5 meters),⁴⁴ direction, velocity, altitude, date and timestamp, and historical information. This information cannot be discerned through mere visual observation, and is therefore not “already public.”
43. GPS tracking records can reveal every facet of an individual’s existence, including where and when one works, shops, worships, socializes or volunteers.⁴⁵
44. Five Supreme Court Justices, writing in concurrence with the landmark GPS-tracking case *United States v. Jones*, agreed that ongoing monitoring of location “impinges on expectations of privacy.”⁴⁶

⁴¹ *Gibbs-Bolender v. CAGA Acceptance, LLC.*, No. 2:14-CV-01684-APG-GWF, 2015 WL 685217, Ex. 5 (D. Nev. Feb. 18, 2015) [attached herein as Exhibit B].

⁴² Ex. B.

⁴³ *Id.*

⁴⁴ *GPS Accuracy*, GPS.gov (Feb. 10, 2017), <http://www.gps.gov/systems/gps/performance/accuracy/>.

⁴⁵ See *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff’d in part sub nom. United States v. Jones*, 132 S. Ct. 945 (2012) (“A person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.”).

⁴⁶ See *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

45. The FTC has recognized that “the increasing collection, use, and disclosure of [geolocation] data presents serious privacy concerns. For this reason, the Commission considers precise geolocation data to be sensitive, warranting opt-in consent prior to collection from a consumer’s mobile device.”⁴⁷
46. The FTC has raised concerns about “take-it-or-leave it” contracts of adhesion, in which a company conditions the use of a product or service on a consumer’s acceptance of the company’s data practices. According to the Commission, “a ‘take it or leave it’ approach is problematic from a privacy perspective, in markets for important services where consumers have few options.”⁴⁸
47. According to a securities filing, the FTC issued a civil investigative demand to Credit Acceptance Corporation “seeking information on the Company’s policies, practices and procedures in allowing car dealers to use GPS Starter Interrupters on consumer vehicles.”⁴⁹
48. According to 2014 Government Accountability Office (“GAO”) testimony, the collection and disclosure of consumer location information by in-car GPS technologies pose serious risks to consumer privacy.⁵⁰ Storing location information over time “allows companies to create a detailed profile of individual behavior, including habits, preferences, and routines,” the exploitation of which can lead to identity theft or threats to personal safety.⁵¹
49. The use of GPS-enabled SIDs to engage in constant, real-time surveillance of a borrower’s location and to constrain a borrower’s movements within geo-fenced boundaries represents a significant invasion of the constitutional right to privacy.
50. A subprime auto lender in Texas tracked down and repossessed the car of a woman who had fled to a shelter to escape her abusive husband. The woman’s location was under constant surveillance via the lender’s GPS tracking device in her vehicle.⁵²
51. The use of SIDs to disable vehicles can result in serious safety risks. Borrowers have reported their cars being disabled while idling at stoplights, refueling at gas stations,⁵³ and when stranded in remote or dangerous locations.⁵⁴

⁴⁷ *The Location Privacy Protection Act of 2014, Hearing on S. 2171 Before the S. Comm. on the Judiciary*, 113th Cong. 7 (2014) (Statement of Jessica Rich, Director, Bureau of Consumer Prot., FTC). See also FTC, *Protecting Consumers in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 59 (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>

⁴⁸ FTC, *supra* note 47, at 51.

⁴⁹ Credit Acceptance Corp., Annual Report (Form 10-K) (Feb. 10, 2017).

⁵⁰ U.S. Gov. Accountability Office, GAO-14-649T, *Consumers’ Location Data: Companies Take Steps to Protect Privacy, but Practices Are Inconsistent, and Risks May Not Be Clear to Consumers* (June 2014), <http://www.gao.gov/assets/670/663787.pdf>.

⁵¹ *Id.* at 5.

⁵² Corkery & Silver-Greenberg, *supra* note 23.

52. If a vehicle is disabled in a remote location with poor cellular or wireless connectivity, the driver could be stranded.
53. PassTime disclaims responsibility for vehicles it has stranded. The PassTime disclosure form states that restart codes may not function in locations with inadequate reception and where cell phone service is unavailable. PassTime advises consumers that in the event remote wireless entry of restart codes does not work due to inadequate wireless or cellular service, the consumer must call the dealer to restart her car.⁵⁵
54. At a 2013 hearing before the Nevada Assembly Committee on Commerce and Labor, a CAGA borrower testified that on two separate occasions, her lender, CAGA, remotely activated the PassTime SID to disable her vehicle while she was driving.⁵⁶

F. Lawmakers, News Media, and Privacy Experts Have Expressed Concern About SIDs and Similar Commercial Surveillance Practices

55. Several members of Congress have expressed concern over the use of SIDs and called for Congressional oversight of this practice.
56. U.S. Representatives Frank Pallone, Diana DeGette, and Jan Schakowsky called on the House Energy and Commerce Committee to investigate the privacy and security concerns raised by the use of SIDs in the subprime auto lending industry, “which presents a serious privacy and safety concern.”⁵⁷ The letter warned:

Some borrowers also have been “geo-fenced” alerting lenders whenever the borrowers are not traveling within their normal routine to and from work. One consumer reported being tracked to a domestic violence shelter. All Americans are entitled a right to privacy, but borrowers with low credit scores are often left with an impossible choice: sacrifice their right to privacy or their access to a vehicle.⁵⁸

57. An investigation by the *New York Times* into the subprime auto lending industry and its reliance on SIDs revealed that many borrowers “are finding that credit comes at a steep

⁵³ *Nev. Commerce Comm. Meeting, supra* note 35 (Testimony of T. Candice Smith).

⁵⁴ Jim Gallagher, *Starter Cut-Off Devices Keep Car Payments Coming*, St. Louis Post-Dispatch (Sep. 22, 2013), http://www.stltoday.com/business/local/starter-cut-off-devices-keep-car-payments-coming/article_be4dfa8d-48bb-5d4c-9734-c93404c63250.html.

⁵⁵ Ex. A.

⁵⁶ *Nev. Commerce Comm. Meeting, supra* note 35 (Testimony of T. Candice Smith).

⁵⁷ Press Release, *Rep. Jan Schakowsky, Ranking Member Pallone, Schakowsky and DeGette Request Hearing on the Rise of Subprime Auto Loans* (Feb. 5, 2015), <https://schakowsky.house.gov/press-releases/ranking-members-pallone-schakowsky-and-degette-request-hearing-on-the-rise-of-subprime-auto-loans/>.

⁵⁸ *Id.*

price to their privacy and, at times, their dignity.”⁵⁹ CAGA’s use of PassTime services was the primary focus of the report. The *Times* also described the use of geo-fencing to notify lenders when a borrower is not traveling to his regular place of employment.⁶⁰

58. The *New York Times* article described how one subprime lender “can monitor the movements of about 880 subprime borrowers on a computerized map that shows the location of their cars with a red marker.” The lender described using his mobile phone to disable vehicles, stating, “I have disabled a car while I was shopping at Walmart.”⁶¹

59. The HBO show *Last Week Tonight with John Oliver* ran a segment on the subprime auto lending industry.⁶² The piece described the hardships many borrowers face and how the industry takes advantage of subprime borrowers, who are typically charged interest rates from 19 to 29 percent.⁶³

60. An article by the legal industry publication *Law360* warned:

When a GPS is placed by an automobile dealer on a vehicle along with so-called “starter-interrupter” devices, the dealer has not only location information but also a remedy, available for use in its sole discretion. In addition to unfairness concerns, such heavy-handed recourse has a discriminatory impact, given that they are mostly likely to be used for low-income/higher-risk borrowers.⁶⁴

61. A *Forbes* report on SIDs noted that, “[m]uch like with rent-to-own computers, not being able to pay for a product upfront results in a privacy tax.”⁶⁵

62. In an exposé about creditors using technology to control borrowers, *The Atlantic* stated:

[W]hen it comes to the enforcement of debt, the debtor’s dignity is always the first thing that comes under attack. Whether through repeated collection calls, or through a GPS tracking system, the creditor intrudes unapologetically into the debtor’s private sphere. Technology may have merely made the creditor more powerful, but that power is nothing to

⁵⁹ Corkery & Silver-Greenberg, *supra* note 23.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Last Week Tonight with John Oliver* (HBO television broadcast Aug. 14, 2016), <http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/3/80-august-14-2016/index.html>.

⁶³ *Id.*

⁶⁴ Bart Huffman, *Where GPS Tracking and Privacy Rights Collide*, *Law360* (Dec. 2, 2014), <http://www.law360.com/articles/599585/where-gps-tracking-and-privacy-rights-collide>.

⁶⁵ Kashmir Hill, *People With Bad Credit Can Buy Cars, But They Are Tracked And Have Remote-Kill Switches*, *Forbes* (Sept. 24, 2014), <http://www.forbes.com/sites/kashmirhill/2014/09/25/starter-interrupt-devices/#2f76bae762ce>.

sneeze at. Tracking systems—whether GPS-based, or otherwise—make sure that property never truly leaves the creditor’s sight.⁶⁶

63. The use of geo-fencing technology to monitor and constrain borrowers’ movements resembles the warnings of privacy expert Gary Marx. In a 1987 *New York Times* article, Marx cautioned against a growing presence of surveillance akin to an “electronic leash.”⁶⁷ Advances in surveillance technologies, accompanied by their decreased costs, allows employers to closely monitor the locations of employees to ensure productivity.⁶⁸ Marx warned that such constant monitoring has an immediate chilling effect on individuals’ ability to engage in private and personal activities.
64. Professors Jerome Dobson and Peter F. Fisher have described the risks of “geoslavery,” where location tracking technology facilitates coercive control over individuals’ freedom of movement and travel.⁶⁹

G. States Have Enacted Laws to Regulate the Use of SIDs

65. California law requires “buy here, pay here” car dealers to obtain borrowers’ affirmative consent to location tracking, which is permissible only for maintenance and repossession purposes and must not be a condition of the sale.⁷⁰
66. Wisconsin looks unfavorably on the use of SIDs, and governs their use under the Wisconsin Consumer Act, which calls for detailed disclosures in motor vehicle leasing transactions.⁷¹
67. Connecticut requires buyers to voluntarily and contractually agree to the SIDs being attached to the vehicle.⁷²
68. Other states prohibit electronic tracking without consent, including Michigan,⁷³ Tennessee,⁷⁴ Illinois,⁷⁵ and Rhode Island.⁷⁶

⁶⁶ Sarah Jeong, *How Technology Helps Creditors Control Debtors*, *The Atlantic* (Apr. 15, 2016), <http://www.theatlantic.com/technology/archive/2016/04/rental-company-control/478365/>.

⁶⁷ Gary T. Marx, *The Company is Watching You Everywhere*, *N.Y. Times* (Feb. 15, 1987), <http://web.mit.edu/gtmarx/www/companywatching.html>.

⁶⁸ *Id.*

⁶⁹ Jerome E. Dobson & Peter F. Fisher, *Geoslavery*, *IEEE Tech. & Soc’y Mag.*, Spring 2003, at 47.

⁷⁰ Cal. Civ. Code § 2983.37(a).

⁷¹ *See Installation of GPS and/or Starter Interrupt Technology on a Vehicle*, Wis. Dep’t of Fin. Institutions (Jan. 26, 2016),

https://www.wdfi.org/wca/business_guidance/interpretive_opinions/Installation_of_GPS_Device_on_a_Vehicle.htm.

⁷² Conn. Gen. Stat. § 42a-9-609(d).

⁷³ Mich. Comp. Laws § 750.539.

⁷⁴ Tenn. Stat. § 39-13-606.

⁷⁵ 720 Ill. Comp. Stat. 5/21-2.5.

⁷⁶ 11 R.I. Gen. Laws § 11-68-1 (“express written consent”).

69. The Office of the State Bank Commissioner of Kansas issued informal advice warning that SIDs “present[ed] a serious public safety concern” and may constitute an unconscionable act or practice under state law.⁷⁷
70. New Jersey legislators introduced a measure to prohibit the use of SIDs as a condition of securing vehicle financing, which was passed unanimously by the Assembly Consumer Affairs Committee.⁷⁸ According to the bill:

Use of the devices is generally unregulated and allows predatory lenders to track and store data concerning the movements of a vehicle without any safeguards for the privacy of its owner or operator, and in the case of devices with starter interrupt capability, allows the remote disabling of motor vehicles without warning, causing potential public safety issues and other serious consequences.⁷⁹

71. New York lawmakers introduced similar legislation to prohibit the use of SIDs as a condition for vehicle purchases.⁸⁰ According to the bill text, the use of SIDs:

[A]llows lenders to remotely disable the ignition in order to prevent a car from starting within minutes of a payment being late. This reckless practice can threaten public safety and result in serious consequences. Instances of parents being unable to rush seriously ill children to the hospital due to lenders activating the devices are becoming increasingly more common. Additionally, many of these devices have GPS technology which allow the lenders to track the cars’ location and movements with very few regulations to protect individual privacy and public safety.⁸¹

V. Legal Analysis

A. The CFPB’s Authority Under CFPA

72. Sections 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1), prohibit a “covered person” or “service provider” from engaging in “any unfair, deceptive or abusive act or practice.”⁸²
73. An act or practice is “unfair” when “it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition.”⁸³

⁷⁷ Hudson Cook, LLP, *The Law Applicable to the Payment Assurance Technology Industry* C-6 (2013), <http://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/CL/ACL493C.pdf> (quoting the Kansas Office of the State Bank Commissioner).

⁷⁸ A.B. 4033, 216th Leg. (N.J. 2014).

⁷⁹ *Id.*

⁸⁰ A.B. 3463, 2015 Leg. (N.Y. 2015).

⁸¹ *Id.*

⁸² 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

74. A substantial injury usually consists of monetary harm, but emotional harm can also contribute or amount to substantial injury in certain circumstances. A significant risk of concrete harm is sufficient to satisfy the substantial injury requirement.⁸⁴
75. An injury is not reasonably avoidable when the act or practice interferes with the ability of the consumer to make effective decisions to avoid injury.⁸⁵
76. The CFPB has previously determined that “[c]onsumer harm is not reasonably avoidable when consumers lack the free and informed choice to avoid it.”⁸⁶
77. Finally, to find a practice unfair, there must be no countervailing benefits that outweigh the injury.⁸⁷ Examples of countervailing benefits that can outweigh the unfair practice may include “lower prices to the consumer or a wider availability of products and services resulting from competition.”⁸⁸ Matters of public policy, established by statute, regulation, judicial decision, or agency determination, may also be considered in an unfairness determination.⁸⁹
78. An act or practice is deceptive if it involves a “representation, omission, or practice that is likely to mislead the consumer acting reasonably under the circumstances, to the consumer’s detriment.”⁹⁰
79. An act or practice “abusive” if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or takes unreasonable advantage of (a) a consumer’s lack of understanding regarding the material risks, costs, or conditions of a consumer financial product or service; (b) a consumer’s inability to protect his interests; or (c) a consumer’s reasonable reliance on the belief that the covered person was acting in the interests of the consumer.⁹¹

⁸³ See § 5531(c); *CFPB Supervision and Examination Manual* UDAAP 1-2 (2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf [hereinafter *CFPB Manual*].

⁸⁴ *CFPB Manual*, *supra* note 83, at UDAAP 1–2.

⁸⁵ *Id.* at UDAAP 2.

⁸⁶ Plaintiff’s Consolidated Opposition to Pathfinder, Global Payments, and Frontline’s Motions to Dismiss, *Consumer Financial Protection Bureau v. Universal Debt & Payment Solutions, LLC, et al.*, No. 1:15-CV-0859-RWS, 2015 WL 4724557 (N.D. Ga. filed June 5, 2015), ECF No. 114 at 13.

⁸⁷ § 5531(c); *CFPB Manual*, *supra* note 83, at UDAAP 3.

⁸⁸ *CFPB Manual*, *supra* note 83, at UDAAP 2.

⁸⁹ *Id.* at UDAAP 3.

⁹⁰ FTC, *FTC Policy Statement on Deception* (1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>. The CFPB incorporates the definition of “deceptive” adopted by the FTC. See *CFPB Manual*, *supra* note 83, at UDAAP 5.

⁹¹ 12 U.S.C. § 5531; see also Laurie A. Lucas, Adam D. Maarec, and John C. Morton, “Abusive” Acts or Practices Under the CFPB’s UDAAP Prohibition, 71 *The Bus. Law.* 749, 750 (Spring 2016), http://www.paymentlawadvisor.com/files/2016/04/TBL-71-2_20_Lucas.pdf.

80. Whether an act or practice “takes unreasonable advantage of . . . the inability of the consumer to protect” her interests “refers to oppressive circumstances—when a consumer is unable to protect herself not in absolute terms, but *relative to* the excessively stronger position of the defendant.”⁹²

81. The Bureau has found abusive practices when companies failed to adequately and timely address billing disputes,⁹³ failed to follow the rights afforded to consumers by state law,⁹⁴ and “leveraged an artificial sense of urgency” to take “unreasonable advantage of the inability of consumers to protect their own interests.”⁹⁵

B. Count I: CAGA’s Use of SIDs with GPS and Geo-Fencing Capabilities Unfairly Subjects Borrowers to Privacy and Security Risks in Violation of the CFPA

82. As described above, CAGA uses GPS-equipped SIDs to monitor borrowers’ real-time location, limit borrowers’ movements to prescribed boundaries via geo-fencing technology, and disable vehicles in remote or dangerous locations or while the vehicle is in operation.

83. CAGA’s acts or practices cause or are likely to cause substantial injury to consumers, resulting from physical safety risks and the emotional impact of being subjected to violations of personal privacy and dignity.

84. Consumers cannot reasonably avoid these substantial injuries because CAGA requires installation of the SID as a condition of the auto loan.

85. The substantial injury to consumers is not outweighed by countervailing benefits to consumers or competition. Subprime borrowers whose financing is conditioned on the installation of these devices are still charged high interest rates and do not receive other price reductions or benefits from the use of the device.

86. According to the FTC, this “take-it-or-leave-it” approach that requires borrowers to sacrifice their privacy to obtain vehicle financing raises concerns is contrary to public policy.⁹⁶

87. Access to transportation is vitally important to American families, and consumers with poor credit are left with few options. As stated above, an estimated seventy percent of cars financed by subprime auto loans are equipped with SIDs or similar devices.⁹⁷

⁹² *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at *30 (S.D. Ind. Mar. 6, 2015).

⁹³ Complaint, *CFPB v. PayPal, Inc.*, No. 1:15-cv-01426 (D. Md. May 19, 2015).

⁹⁴ Consent Order, *In re Colfax Capital Corp.*, No. 2014-CFPB-009 (July 29, 2014).

⁹⁵ Consent Order, *In re ACE Cash Express, Inc.*, No. 2014-CFPB-008 (July 10, 2014).

⁹⁶ FTC, *supra* note 47, at 51.

⁹⁷ Lee, *supra* note 26 (quoting Corinne Kirkendall, PassTime USA Vice President for Public Relations).

88. Therefore, CAGA's use of SIDs is an unfair act or practice in violation of Section 1031 of the CFPA.⁹⁸

C. Count II: PassTime Provides Material Services to CAGA and Other Subprime Auto Lenders Engaging in Unfair Acts or Practices in Violation of the CFPA

89. As described above, PassTime provides material services to CAGA and other subprime auto lenders engaging in unfair acts or practices by designing, engineering, manufacturing, distributing, and servicing payment assurance devices equipped with starter interrupt, GPS tracking, and geo-fencing capabilities.

90. PassTime's acts or practices are likely to cause substantial injury to consumers resulting from risks to physical safety and privacy rights, which consumers cannot reasonably avoid and are not outweighed by countervailing benefits to consumers or competition.

91. Therefore, PassTime's acts and practices constitute unfair acts or practices in violation of the CFPA.⁹⁹

D. Count III. CAGA Takes Unreasonable Advantage of Borrowers' Inability to Protect Their Privacy and Safety Interests in Violation of the CFPA's Prohibition Against Abusive Practices

92. As described above, CAGA requires borrowers to agree to the installation of SIDs in their vehicles to allow CAGA to monitor the vehicle's location and disable the vehicle as a condition of financing.

93. CAGA offers consumers adhesion contracts on a take-it-or-leave-it basis, forcing consumers to choose between the basic necessity of transportation and the right to privacy.

94. Exploitation of borrowers is common in subprime markets, where consumers are often less financially sophisticated and more vulnerable to exploitation by lenders.¹⁰⁰

CAGA's "excessively stronger position"¹⁰¹ relative to subprime borrowers creates oppressive circumstances that take unreasonable advantage of the consumer's inability to protect her privacy and safety interests.

95. Therefore, CAGA engages in abusive practices in violation of Section 1031 of the CFPA.¹⁰²

⁹⁸ 12 U.S.C. § 5531(c)(1).

⁹⁹ 12 U.S.C. § 5531(c)(1).

¹⁰⁰ See Tiffany S. Lee, *No More Abuse: The Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard*, 14 J. Consumer & Com. L. 118 (2011).

¹⁰¹ *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at *30 (S.D. Ind. Mar. 6, 2015).

¹⁰² 12 U.S.C. § 5531(d)(2)(B).

VI. Prayer for Investigation and Relief

96. EPIC urges the Bureau to investigate CAGA and PassTime and to enjoin their unfair and abusive practices with respect to the use of payment assurance devices equipped with starter interrupt, GPS tracking, and geo-fencing capabilities.
97. Specifically, EPIC requests that the Bureau:
- a. Initiate an investigation into CAGA's geolocation surveillance practices;
 - b. Initiate an investigation into PassTime's geolocation surveillance and geo-fencing services;
 - c. Halt practices of CAGA, PassTime, and similar auto lenders and service providers that curtail the abilities of low-income individuals to move safely, freely, and privately;
 - d. Investigate other companies engaged in similar practices; and
 - e. Provide other such relief as the Commission finds necessary and appropriate.

Respectfully Submitted,

/s/ Marc Rotenberg
Marc Rotenberg
EPIC President and Executive Director

/s/ James T. Graves
James T. Graves
EPIC Law and Technology Fellow

/s/ Ryan Morrison
Ryan Morrison
EPIC Law Clerk

Electronic Privacy Information Center
1718 Connecticut Ave. NW Suite 200
Washington, DC 20009
202-483-1140 (tel)
202-483-1248 (fax)